MASTER DISSERTATION

PARENTAL LIABILITY IN EU COMPETITION LAW INFRINGEMENTS: A PRACTICAL APPROACH

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ABBREVIATIONS AND ACRONYMS

AG	Advocate General
BLI	Business Law International
CAT	United Kingdom's Competition Appeal Tribunal
CFI	Court of First Instance of the European Communities
CJ	Court of Justice
CLB	Competition Laws Bulletin
CLJ	Competition Law Journal
Court	Court of Justice of the European Union, which includes the CJ and the GC
CPN	Competition Policy Newsletter
DR	Diário da República
EC	European Commission
ECLR	European Competition Law Review
ECMR	EC Merger Regulation
ECR	European Court Reports
ELR	European Law Review
EU	European Union
EUI	European University Institute
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
GC	General Court
GCR	Global Competition Review
GLG	Global Legal Group
ICL	Institute of Competition Law
ICLG	International Comparative Legal Guide
IEFTL	Institute of Economic, Financial and Tax Law
LCA	Lisbon Court of Appeal

LCC	Lisbon Commercial Court
NLR	National Law Review
OFT	United Kingdom's Office of Fair Trading
OJ	Official Journal of the European Union
PCA	Portuguese Competition Authority
PLC	Practical Law Company
Portuguese Competition Act	Law No. 19/2012, May 8
SO	Statement of objections
TEC	Treaty establishing the European Communities
TFEU	Treaty on the Functioning of the European Union
WC	World Competition – Law and Economics Review

Disclaimer: for ease of reference and in the interest of efficiency, judgments, decisions, legislation, soft law and literature are quoted in this order, in abbreviated terms, and by means of example throughout the document. A complete list of the relevant supporting information, documents and respective sources (where applicable) is provided at the end of this paper. Unless otherwise resulting from the context, indications to items in judgments and decisions shall refer to the respective paragraphs and, in the case of bibliography, to the applicable pages.

1. INTRODUCTION

The way the EU built its practice to place liability on parent companies for the wrongs of present and former subsidiaries in competition infringements is one of the most controversial subjects in this field of law.

Almost all decisions addressed to parent companies in this area inevitably end up being challenged in Court. Traders have a great deal of difficulty in accepting the underlying goals of this policy, as it stretches the gap between law and economic realm to the limit. Some of the arguments discussed today before the EU judicature are the exact same put forward 40 years in the past. Authors and practitioners fiercely turn against the rationale of the doctrine and constantly seek for exemptions to break out of the seemingly inevitable grid of group liability.

For years, parental liability was suspected of breaching some of the most fundamental principles of EU law, *v.g.* presumption of innocence,[1] legality of offences and penalties,[2] non-discrimination,[3] proportionality,[4] rights of defence,[5] equality of arms,[6] sound administration,[7] and autonomy of legal persons.[8]

Yet, the EC managed to succeed against these contentions without any support from the EU legislature. This is an area which took the EC and the Court time and resilience to build in the name of effective deterrence in the fight against antitrust offences.

[1] GC *Otis* 71-3, 76; 2011 *ThyssenKrupp* 112-7; CJ 2011 *Elf Aquitaine* 59.
[2] 1991 *Anic* 145; CJ *Akzo* 71, 77; CJ *General Química* 52; 2011 *Schindler* 94-115; 2012 *AOI* 62-3; 2012 *Shell* 54.
[3] 2005 *Tokai* 397; CJ *Otis* 53; 13.9.2012 *Total & Elf Aquitaine* 68-72.
[4] *Areva* 348-51; 13.9.2012 *Total & Elf Aquitaine* 80.
[5] CJ *ARBED* 19-24; 2005 *Tokai* 140-1; 2006 *Avebe* 49; 9.9.2011 *AOI* 178-88.
[6] GC 2011 *Elf Aquitaine* 155-9.
[7] GC 2011 *Elf Aquitaine* 237-41, 262-3; 2011 *Team Relocations* 169-70.
[8] 2009 *Arkema* 100; 2009 *Elf Aquitaine* 125.

The flip side of the coin is that parental liability bears wide-reaching costs for undertakings. In the short term it renders parents liable for the infringements of their daughters, allows the 10% fine cap to encompass the turnover of the whole group, triggers aggravating circumstances in respect of the entire group leading to a substantial uptake in the fines, submits the whole undertaking to investigative and intrusive measures and may render it liable in foreign jurisdictions. In the long run, attaching an infringing record to the undertaking concerned raises, along with reputational harm, the risk of exposure to private damages actions.

We intend to give this subject a pragmatic spin, examining and clarifying its main principles and rules, which are based on copious case laws and practices, and hopefully shed some light on its strengths and weaknesses.

2. SCOPE OF ANALYSIS

This paper concerns the accountability of parent companies for infringements committed by their subsidiaries against the background of proceedings relating to Articles 101 and 102 TFEU.

Although this work is focused on parental liability under EU competition law, the lessons learnt from it are largely applicable to cases conducted by national agencies as well. Indeed, subsequent to Regulation 1/2003, national authorities and courts are bound to apply Articles 101 and 102 TFEU whenever applying their competition laws to collusive and unilateral anticompetitive behaviours that may affect trade between Member States.

Given that in the present state of integration of EU markets a significant part of competition infringements are likely to affect trade between Member States to an appreciable extent,[9] this

[9] EC *Guidelines on the effect on trade* 19-57.

means investigations carried out by national authorities will often trigger EU law, alone or concomitantly with national law.

This has also happened where national agencies sought to impute liability to parent companies for competition breaches perpetrated by their subsidiaries. In Portugal, for instance, the PCA envisaged tackling this doctrine at least three times, but Portuguese courts have not yet ruled on the substance of the issue.[10]

Along with Portugal, other jurisdictions have relied on parental liability rules designed by the EU when handling, at the national level, infringements caught by Articles 101 and 102. The Italian competition authority has done it,[11] as well as the OFT in the United Kingdom, endorsed by the country's CAT.[12] English courts have also appraised claims in civil damages actions against parents involved in EU cartels.[13] Likewise, the CJ has already dealt with questions referred for preliminary rulings, relating to the interpretation and application of this doctrine in national proceedings.[14]

Reference to these cases serves the purpose of illustrating that the importance of the rules on shared parental liability extends greatly beyond Brussels and Luxembourg's working rooms. The more so as the law stemming from EU Treaties and institutions has primacy over the law of the Member States.[15]

[10] 2006 *Vatel et al.*, where the PCA held a subsidiary liable for the conduct of its parent company, so this case cannot be treated on the same footing as those involving parental liability (partially annulled by LCC and LCA's judgments of 2007); 2009 *PT / ZON* involving a problem of liability succession (LCC stated in 2011 judgment that the proceedings reached the statute of limitation and the PCA's power to impose a fine was time-barred); 2009 *Eurest et al.* (quashed by the LCC in 2010 *Sodexo et al.* on procedural grounds).
[11] 2000 *RC Auto* 42, fn 4; 2003 *Tabacchi* 209-14.
[12] 2007 *Double Quick* 46, 65-80. 2002 *Suretrack* 18, in 2012 *Ezrachi* 23.
[13] 2003 *Provimi*; 2008 *Emerson*; 2010 *Cooper Tire*; 2011 *Toshiba*.
[14] *ETI*.
[15] 1964 *Costa / ENEL* pp. 593-4; Declaration 17 annexed to the Lisbon Treaty; Article 8(4) of the Portuguese Constitution.

Given the latitude of the 'effect on trade' jurisdictional threshold, EU rules on parental liability are a leverage national agencies and courts may avail themselves of in most of their antitrust investigations.

It falls outside the scope of the present work to assess the application and impact of this doctrine at the national level, either on the contrast between EU and national law[16] or on the few (if not theoretical) cases where it might bring about purely internal disputes.

3. CONCEPT OF UNDERTAKING

The starting point of the discussion lies on the notion of undertaking. The term is defined nowhere in the treaties, but it was soon realised that it would have to be one of a functional and specific nature[17] and that, in matters of competition, business reality is more important than legal form, thus blurring the distinction between undertakings, companies and individuals.[18]

Essentially, an undertaking refers to any entity engaged in a commercial activity, *i.e.* an economic unity consisting of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and capable of contributing *inter alia* to the commission of an infringement.[19] The legal status and the way in which it is financed are irrelevant, even if in law an economic unit consists of several persons, natural or legal.[20] The idea is that formal separation between companies, resulting from their distinct personality, cannot outweigh the unity of their conduct on the market.[21]

The first reported time where EU institutions took note of the particular situation of groups of companies was in 1969 when the EC exempted from the application of Article 85 TEC (now

[16] *Oliveira & Ferro* 64 *et seq*.
[17] 2012 *Elf Aquitaine* 23; 13.9.2012 *Total & Elf Aquitaine* 23. *Cartonboard* 140.
[18] 1972 *ICI* p. 632.
[19] 1992 *Shell* 311; GC 2007 *Akzo* 57; *EI du Pont* 58; 2012 *Dow* 73.
[20] GC *DaimlerChrysler* 85; CJ *Akzo* 54-5; 2011 *AG2R* 41.
[21] *ICI* 140; 1972 *Geigy* 45; 1972 *Sandoz* 45.

Article 101 TFEU) an agreement between a parent and a subsidiary on the grounds that the two were not competing with each other, rather the subsidiary was an integral part of the business entity under the control of the parent.[22]

Consequently, the importance of economic unities was at the outset identified in the context of in house relationships. However, if in this context the existence of a group relationship had a positive outcome for undertakings, in that it ruled out the application of Article 101 TFEU or corresponding previous articles[23] – known as 'group privilege' –, unfavourable consequences soon followed.

4. MAIN PRINCIPLES AND RULES GOVERNING PARENTAL LIABILITY

The earliest appearance of the doctrine in the EU can be traced back to the 1970s in the landmark 'Dyestuffs cases'. In assessing liability for an infringement of current Article 101,[24] the Court held that the fact that a subsidiary has a separate legal personality is not sufficient to exclude imputing its conduct to the parent company if it "*does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.*"[25]

This statement echoed on numerous subsequent cases[26] and was gradually fine-tuned.

4.1 Rationale of the doctrine

Assigning to a company liability for the conduct of another is something that is not specific to parent-subsidiary relationships. Suffice it to observe that where it turns out an undertaking has

[22] 1969 *Christiani & Nielsen*.
[23] *ICI* 134; 15/74 *Centrafarm* 41; 16/74 *Centrafarm* 32; 1989 *Ahmed Saeed* 35; 1992 *SIV* 357. 2008 *Bellamy & Child* 103; *Oliveira & Ferro* 78-9.
[24] This is also valid in respect to Article 102 TFEU: 1984 *Hydrotherm* 11; CJ *Viho* 17; 2003 *Michelin* 290; 2009 *Clearstream* 198.
[25] *ICI* 132-5; *Geigy* 44; *Sandoz* 44.
[26] 1973 *Continental Can* 15; 1983 *AEG* 49; CJ *Aristrain* 96; CJ *Akzo* 58; CJ 2011 *ArcelorMittal* 96; CJ 2011 *Elf Aquitaine* 54; 2012 *Dow* 74. 2004 *Copper Plumbing Tubes* 543; 2006 *Methacrylates* 246-7.

followed the directions issued to it by another, the anticompetitive conduct of the former can be imputed to the latter.[27]

Therefore, Article 23 of Regulation 1/2003 is interpreted as meaning that an undertaking may be declared liable with another for a wrongdoing provided that it is demonstrated that the infringement could also be found to have been committed by the first undertaking.[28]

In group relationships, things are a bit different.

Evidently, the anticompetitive conduct of a subsidiary may be imputed to its parent if there is specific evidence implicating the parent in the subsidiary's actions.[29] The EC is also keen to make parents liable if they were or should have been aware of the infringing behaviour of their daughters.[30]

In a scenario where a parent company is liable with its subsidiary by a breach materially committed by the second, and even if the parent is not directly involved in the infraction, still the parent itself is deemed to have committed an individual infringement just on account of the fact that the two constitute a single group.[31] This 'collective personal responsibility' is one of the reasons why parental liability is considered to be compatible with the general principle of individual liability.[32]

What is more, the Court went so far as to consider that the bond of economic dependence existing between a parent and a subsidiary does not preclude a divergence in conduct or in

[27] 1975 *Suiker Unie* 538-40; 2002 *HFB* 527; 2012 *Shell* 37.
[28] 1998 *Metsä-Serla* 42-3; *HFB* 527.
[29] CJ *KNP* 73; GC *Otis* 104. 2007 *Sorinas* 495-6.
[30] *Sorinas* 497.
[31] 2000 *Metsä-Serla* 28, 34; 2012 *Dow* 176. 2010 *Wenner & Barlingen* 26; 2011 *Olaerts & Cauffman* 433; *Joshua et al.* 5.
[32] Fn 2.

interests between the two that would prevent the conduct of the latter from being ascribed to them both.[33]

In any event, the particular reasoning behind parental liability is that it is not because the parent instigated its subsidiary to commit the infringement or because the parent participated in the infringement, or even because it was aware of it, but merely because the two form a single undertaking that a parent may be held liable with a subsidiary for an infraction to EU competition rules and a fine thereof.[34]

In a nutshell, the cognitive *iter* routinely followed by the Court with regard to the rationale of liability of a parent company for the conduct alleged against its subsidiary is the following.[35]

The Court observes that formal separation of two companies resulting from their having distinct legal identity is not decisive. The criterion is whether or not there is some form of unity in their conduct on the market. Accordingly, so the argument goes, it may prove necessary to establish whether two companies fall within one and the same undertaking.

As regards the question whether a person who is not the perpetrator of the infringement may nonetheless be penalised, it is apparent, following on from the points just made, that the conduct of a subsidiary may be imputed to its parent in particular where the subsidiary does not decide independently upon its own conduct on the market, but follows instructions given to it by the parent.

In such a situation, the parent and the subsidiary form a single undertaking and this enables competition authorities to address a decision imposing fines to the parent company without having to establish its personal involvement in the infringement.

[33] 1979 *BMW* 24. *Montesa & Givaja* 567-8.
[34] CJ *Akzo* 59; CJ 2011 *Elf Aquitaine* 88; 13.9.2012 *Total & Elf Aquitaine* 31. 2006 *Hydrogen Peroxide* 441.
[35] CJ *General Química* 34-8; *FLSmidth* 30; 2012 *AOI* 42-4.

4.2 Attribution of liability

Unlike merger control, where all it takes to establish group relationships is "*the possibility*" of exercising decisive influence on a company,[36] in parental liability a further cross-check needs to be carried out.[37]

In order to be able to impute the conduct of a subsidiary to a parent company under EU law, competition authorities cannot merely find that a parent is in a *position* to exercise decisive influence over its subsidiary but must also demonstrate that such influence was *actually exercised*.[38]

Parental liability cannot be set up on the sole basis of the parent company's *ability* to exert influence on the subsidiary. This first step is actually similar to the review applied in merger control.[39] This fact alone, however, cannot be overestimated for antitrust purposes and must be interpreted with care in this context. It needs merely be pointed out that that first step is not enough for imputing liability to a parent in EU antitrust law, imputation being always dependent on a finding that decisive influence was *actually exercised*.

This approach makes perfect sense for us. Assessing control in order to determine jurisdiction in a merger case has nothing at all to do with imposing responsibility and heavy sanctions on a company. Other EU competition rules, *v.g.* on State aid [40] have no bearing on the conditions for striking liability for an antitrust infringement to a parent company.

In short, in order for the acts of a subsidiary to be attributed to its parent there must be *(i)* a power to direct the subsidiary and *(ii)* the actual exercise of control to such an extent that the

[36] Article 3(2) ECMR; Article 36(3) of the Portuguese competition act.
[37] Criticising this double standard: 2000 *Wils* 106-7; *Montesa & Givaja* 564; *Oliveira & Ferro* 78-9.
[38] *ICI* 137; *AEG* 50; *Team Relocations* 147; 2012 *Dow* 75.
[39] 2010 *AOI* 88-9, 198-200; *Team Relocations* 148; fn 36.
[40] GC 2011 *Elf Aquitaine* 61.

subsidiary does not determine its behaviour on the market autonomously.[41] Normally, the Court skips the first limb and often concentrates simply on the second, because fulfilment of the last condition automatically entails satisfaction of the former.[42]

It follows that the primary question to be resolved in a parental liability situation is whether the parent actually exercised decisive influence over the subsidiary. As a rule, it is for competition agencies to demonstrate such exercise.[43] Typically, that is made by one of three means (or a combination of any): a presumption, factual indicia or a 'dual basis' approach.

4.2.1 Presumption of liability

Full ownership

When a company is in condition to exert a decisive influence on a subsidiary, consideration must still be given to the question whether it actually made use of that power. "*However, such a check appears superfluous in the case of* (…) *a wholly owned subsidiary*, [which] *necessarily follows a policy laid down by the* [parent]."[44]

It was with this sentence, issued as long ago as 1983, that the Court laid the path for a legal presumption according to which, in the particular case of a parent company holding 100% of a subsidiary, it is presumed that they constitute one and the same undertaking and that the parent in fact exercises decisive influence over the subsidiary.

Whether or not the *AEG* Court should claim authorship for the creation of the presumption is at the very least questionable.

[41] 1974 *Commercial Solvents* p. 228; GC *Otis* 69.
[42] 2010 *AOI* 166-7. Against, *Oliveira & Ferro* 58.
[43] *Avebe* 136; CJ *Otis* 43.
[44] *AEG* 50.

Already in 1969, when the EC exempted an intra-group agreement between a parent and a subsidiary, it did so on grounds that it would not be possible for a wholly owned subsidiary to act autonomously from its sole stakeholder.[45] In 1972 the EC kept pushing for some kind of presumption by taking the view in *ICI* that the fact that a subsidiary is controlled by the parent company "*means that it automatically obeys instructions from the parent company.*"[46] Even the Court established in *ICI* an interesting presumption that, based on a pattern of influence by a parent over its subsidiary and in the absence of evidence to the contrary, it must be assumed that on later occasions the same behaviour was adopted.[47] In *Commercial Solvents* the EC acted no differently and sustained that the fact that one company holds a majority of the voting stock of another lends support to the presumption that it controls the latter.[48]

Despite the importance, especially after *AEG*, of the liability presumption, its practical range was far from straightforward for many years. There were serious doubts as to whether it was self-sufficient, which would have the consequence that parental liability would be properly established in full ownership situations, or if it was only a supporting argument that would still require compelling evidence that decisive influence was exercised by the parent.

It is only fair to say that it was not until 2007 in *Akzo* (upheld by the CJ) that this dual vision was brought to a close.

In some of its initial decisions, the EC did not make use of the presumption at all, and held a parent answerable for an infringement only where there was evidence implicating it in the conduct of a subsidiary.[49]

At a later stage, broadly set at 2002 / 2003, there was a shift in the EC's policy on parental liability.[50] From that period onwards, the EC acknowledged the presumption more seriously,

[45] Fn 22.
[46] P. 632.
[47] 139.
[48] P. 230.
[49] 1992 *Shell* 315; 1998 *Metsä-Serla* 58-9. 1986 *Polypropylene* 96-102; *Cartonboard* 143; 2001 *Vitamins* 642; 2002 *Austrian banks* 479.

but went about further strengthening that assumption by adducing corroborating facts.[51] Those facts should show either that the parent was involved in the infringement, or that it was aware of it, or that as a minimum the parent actually intervened in the commercial policy of the infringing subsidiary.[52] This meant that if there was nothing to underpin any of these conclusions on the facts, the EC would abstain from holding shareholders liable for their subsidiaries' infringements.

By then, the EC feared the presumption would not be sufficient *per se* to support parental liability in total ownership scenarios.[53] It was only after 2004 that it relied in full on the presumption.[54]

We have to recognise that the EC's cautiousness was somehow induced by the Court's reluctance over many years to take a clear standing on the probative value of such a presumption, or, worse, by the Court's confusing arguments.

After the *AEG* judgment was delivered, it took the Court a long time to assimilate the presumption. The first serious attempt to bring it back was 10 years later at the hands of a newly created CFI in *BPB*.[55] This judgment was challenged before the CJ, which, in appeal, simply abstained from ruling on the subject and limited itself to adhere to the AG's Opinion on the issue.[56] In the Opinion, AG Léger seemed to flag the message that the *AEG* presumption should be avoided and even qualified it as "*superfluous*" if specific findings of fact are made to establish decisive influence.[57]

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[50] CJ 2011 *Elf Aquitaine* 143, 164.
[51] 2004 *Tobacco Spain* 372.
[52] *Copper Plumbing* 562; 2005 *MCAA* 226-7, 245.
[53] 2010 *AOI* 118, 147.
[54] *MCAA* 258; 2008 *Candle waxes* 574.
[55] GC 1993 *BPB* 149.
[56] CJ 1995 *BPB* 11.
[57] 1994 *BPB* 29.

Whilst the *AEG* Court rendered superfluous to examine if a company exerts decisive influence over a fully owned subsidiary, in *BPB* the Court played the argument backwards and deemed the presumption to be superfluous.

This being the mind set, it came as no surprise that at the first opportunity the GC 'redeemed' itself and, without setting aside the presumption, diminished it in a meaningful way. *Stora* was the judgment that triggered the alarms and went famous because of that. In this case the GC made a parent liable for the conduct of a 100% subsidiary, not on account of the presumption but because it failed to demonstrate the subsidiary's autonomy.[58]

Subsequent to *Stora*, many hours were devoted to determine what exactly the implications of that judgment should be for the soundness of a presumption such as this weighing on parent companies. It so happens that the first result of that struggle came swiftly in 2000 in the *Stora* appeal and did not bring along good news for the EC.

History repeated itself; as in *BPB*, the most sceptical role was once again taken by the AG. In its Opinion, AG Mischo expressed the view that the GC implicitly accepted that a 100% shareholding does not definitively decide the imputability issue and suggested that, although the burden of proving that a parent exercised decisive influence over a subsidiary is eased in the case of 100% control, "[s]*omething more than the extent of the shareholding must be shown, but it may be in the form of indicia.*"[59]

This time the CJ did not go as far as the advice of the AG,[60] yet confirmed that the GC did not hold that a 100% shareholding in itself sufficed for a finding that the parent was responsible.[61]

[58] GC 1998 *Stora* 80.
[59] Opinion CJ 2000 *Stora* 47-8.
[60] Disagreeing, 2007 *Briggs & Jordan* 18; 2011 *La Rocca* 69.
[61] CJ *Stora* 28.

This approach was perceived as meaning that when all shareholding in the subsidiary is held by a single company that circumstance is not, alone and in itself, sufficient to inflict liability.[62]

In 2007, the GC appeared to misconceive the purpose of the presumption, confusing the concept of control with that of exercise of control, when it was plain since 1983 that only the latter could be presumed. This misunderstanding arose in two cases, where the GC declared essentially that, although the evidence relating to a 100% shareholding provides a strong indication that the parent "*is able*" to exercise decisive influence over a subsidiary, this is not enough to attribute liability to the parent.[63] In *Jungbunzlauer*, the Court stood on the same puzzling path.[64]

Finally, in late 2007 the *Akzo* Court reshaped the presumption to what it is in the current state of affairs: a self-fulfilling support to the exercise of decisive influence in full ownership cases. It is true that between *AEG* and *Akzo*, other judgments strove to keep the presumption alive,[65] but none of them risked doing what was missing: unequivocally stressing that "*it is sufficient* (…) *to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy.*"[66]

The *Akzo* Court succeeded in establishing the sufficiency of the presumption for the purposes of supporting, on its own, parental liability in total ownership situations. However, it failed to shed much needed light on past case law. It focused only on *Stora* to hold that the *AEG* principle was not amended by that ruling,[67] but by ignoring the evolution of case law after *Stora*, the Court assumed a new stance that can easily be said to run counter to the previous one.

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[62] *La Rocca* 70.
[63] *DaimlerChrysler* 218-9; 2007 *Bolloré* 132.
[64] 2006 *Jungbunzlauer* 120.
[65] 1999 *PVC II* 961, 984; 2005 *Tokai* 60-2; 2007 *Prym* 146.
[66] CJ *Akzo* 61.
[67] CJ *Akzo* 62.

In any case, the fact remains that after *Akzo*, as a result of an abundant body of case law, it became clear that in the specific case of a company holding 100% of a subsidiary, the parent can exercise a decisive influence over the subsidiary and there is a rebuttable presumption that it does so.

As a result, it is sufficient for agencies wishing to make a parent liable to show that it holds the entire capital of a subsidiary, without the need to offer convincing evidence establishing decisive influence or any other liaison between the parent and the subsidiary's infringement. The presumption made competition authorities' task a walkover.[68]

Quasi-full ownership

In *Commercial Solvents* the EC took the opinion that, whilst it was impossible for a wholly owned subsidiary to act autonomously from its parent, this did not mean that any subsidiary in which the parent holds less than 100% of the capital is autonomous.[69] This readily suggested how the EC was willing to address situations where almost all of a company is owned by another.

Just that way, the EC held a 98% shareholding to be sufficient in itself to impute liability to a parent company solely on the basis of the presumption,[70] which was later upheld by the Court.[71] A similar conclusion was reached where subsidiaries were owned, directly or indirectly, approximately 92%,[72] 96%,[73] 97%[74] or 99%.[75]

[68] 2008 *Ortiz Blanco et al.* 8; 2010 *Riesenkampff & Krauthausen* 41; *La Rocca* 73-4; 2012 *Joshua et al.* 5.
[69] *Commercial Solvents* p. 231; 2010 *Knauf Gips* 82; CJ *Otis* 43.
[70] *MCAA* 258; *Hydrogen Peroxide* 427.
[71] 2009 *Elf Aquitaine* 155-6; 2011 *Arkema* 42.
[72] 2011 *Gosselin* 2, 52-3.
[73] 7.6.2011 *Total & Elf Aquitaine* 2, 53-6; 14.7.2011 *Total & Elf Aquitaine* 2, 51-2.
[74] 2011 *Arkema France et al.* 2, 51-3. 2008 *Sodium chlorate* 396.
[75] *Michelin* 290; 14.7.2011 *Total & Elf Aquitaine* 2, 51-2.

The reasoning for this has been that these subsidiaries, similarly to fully owned companies, do not determine their conduct on the market independently, thereby warranting a finding of joint and several liability on the major shareholder.[76]

The presumption in the case of 100% ownership stems from the fact that a company in this position will almost always exercise decisive influence over its subsidiary, and therefore nothing different should be assumed in cases of next to 100% ownership given that the remaining shareholders, due to their *de minimis* position, will typically have no special minority rights but only a financial interest in the business of the subsidiary.[77]

All in all, EU case law as it stands considers quasi-ownership shareholdings to be assimilated to full ownership for the purposes of the presumption.

Underneath the radar

There is no magical shareholding figure which may *a priori* settle where we should draw the line between the application and the exclusion of the presumption.

Having assumed this, we have never seen the presumption being employed for shareholdings below 90% of the capital of a company.

Reference should also be made to both case law and the EC's decision practice, which seem to suggest that the presumption cannot be relied upon, *e.g.* when a company holds 90%[78] or 87%[79] of another. Lower percentages, such as 65.5%,[80] 60%,[81] 57%[82] or something ranging

[76] *Michelin* 290; 2011 *Álvarez* 35.
[77] GC 2011 *Elf Aquitaine* 56; 2011 *Arkema France et al.* 53. *Sodium chlorate* 396.
[78] 2010 *AOI* 105.
[79] *HFB* 55-61. 1998 *Pre-Insulated Pipe* 157.
[80] *Copper Plumbing* 552.
[81] *FLS Plast* 34, 39; *FLSmidth* 37.
[82] 2009 *Calcium carbide* 252.

between 41%-52%,[83] are also outside the scope of the presumption.[84] Minority holdings such as 25% are far short of a majority interest and unable *per se* to confer decisive influence.[85]

It should, however, be borne in mind that this conclusion only has the effect of hampering the use of the presumption; it does not prevent the parent from being liable for the infringement of a subsidiary if both are deemed to constitute a *de facto* group on the basis of concrete evidence of decisive influence.

This is one of the aspects in which the antitrust doctrine of parental liability most departs from merger proceedings. Here, sometimes even a minority stake may amount to control and cause two companies to be regarded as an undertaking for all intents and purposes. Conversely, shareholdings below substantially high thresholds are unable to substantiate parental liability, let alone establish such a presumption.

Joint ventures

There have been in our opinion some misleading discussions around the possible extension of the liability presumption to joint ventures. The problem concerns again the distinction between control and exercise of control.

If a company is jointly held by two or more shareholders, this in no way precludes the *possibility* of those shareholders exercising decisive influence over the conduct of their common subsidiary. It is irrelevant, in this regard, whether the nature of control is sole or joint and whether that level of influence is enjoyed by virtue of positive or negative powers.[86]

However, this only indicates that it might make sense to assess parental liability in respect to joint ventures, it does not implicate any finding of liability because that also requires meeting

[83] *Copper Plumbing* 558, 562.
[84] 2012 *Debroux* 52.
[85] 2011 *Fuji* 182-3. *Bellamy & Child* 105; 2008 *Herrmann & Säcker* 427.
[86] *Commercial Solvents* p. 232; 2010 *AOI* 88-9, 164; *EI du Pont* 65-9.

the condition pertaining to the actual exercise of control. The Court pointed out that if that condition is satisfied on a joint control case, it will be possible to regard the various controlling parents liable for the conduct of their subsidiary.[87] But this is not what really matters here. The relevant question is whether the presumption, which replaces the need for attesting decisive influence, applies to joint ventures.

In the *Avebe* judgment, the Court appeared to answer affirmatively to this.[88] We believe that in this ruling the Court conflated the concept of control with that of exercise of control. A general possibility of *mere control* by the parents may definitely arise in the case of a jointly-owned subsidiary, but that does not detract from the further need to demonstrate that one or more parents actually exerted decisive influence over that subsidiary. The opposite claim appears flawed considering the wording of the judgment and of the contested decision themselves.[89]

In many other cases of joint control, the Court and the EC recognised that, in the absence of evidence implicating parents in infringements of their subsidiaries or at least in their conducts, they would have to assume that none of them exercised decisive influence on the latter.[90]

The presumption of parental liability might make sense in view of the obvious power that a single (or greatly majority) shareholder has in such a situation, and that no one else holds. However, this may not be the case with joint ventures, where power may be dispersed and consequently weakened.

This is why there is nothing preventing one of the joint stakeholders to be liable for the infringement if it is demonstrated that – even in a situation of joint control – that shareholder alone exercises decisive influence over the joint company for antitrust purposes,[91] even if the

[87] 2010 *AOI* 165; CJ *Otis* 40.
[88] 138.
[89] *Avebe* 93, 106, 137, 139, 141; GC *Otis* 109. 2001 *Sodium Gluconate* 300.
[90] GC *Otis* 110. 2003 *Organic Peroxides* 16, 78, 391; 2007 *Elevators and Escalators* 643.
[91] 2010 *AOI* 165. 2011 *Horvath* 4.

proportion of the subsidiary's capital owned by the parent concerned is smaller than that owned by the other parent.[92]

It is thus not possible to make a judgment of effective exercise of control purely by looking at the shareholding structure of a joint venture. Joint ventures are necessarily the result of a combination of two or several different groups, which is at odds with the intuitive notion of individual undertaking. One of the principles behind the concept of undertaking is that a parent and a subsidiary should not compete with each other.[93] This does not necessarily happen with a joint venture, especially if it is full-function.

It is true that the autonomy of full-function joint ventures does not imply that they are under no influence of their parents within the meaning of Articles 101 and 102 TFEU.[94] However, "[t]*he full-function nature of a joint venture simply makes the joint venture similar to a normal subsidiary having a separate legal personality.*"[95] The EC itself acknowledges that the fundamentals of parental liability point to opposite directions in the case of fully owned subsidiaries or joint ventures.[96]

Simply put, we believe the *Avebe* case should not be interpreted as allowing the use of the parental liability presumption in regard to joint ventures. In other words, the fact that two or more companies hold control over a subsidiary that has breached EU competition law does not preclude one or several parents from being liable for that infringement, provided that it is established that the parent(s) concerned exercised decisive influence over the joint venture.[97] Even in 75/25[98] and 70/30[99] joint ventures parents can be made liable for the conduct of their subsidiaries.

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[92] 2010 *AceaElectrabel* 64; 2012 *AOI* 101.
[93] *Christiani & Nielsen*; *ICI* p. 632.
[94] *EI du Pont* 78; 2012 *Dow* 93. 2008 EC *Consolidated Notice* 93. 2012 *Citron* 2.
[95] 2007 *Chloroprene Rubber* 434.
[96] 2005 *Rubber chemicals* 263.
[97] CJ *Otis* 43; 2012 *Shell* 46.
[98] GC *Otis* 91-120.
[99] *Fuji* 182-203.

Consequences tied to the presumption

Liability presumption is a means of proof that is *available* to competition agencies and the EC in particular. They are able, but under no obligation, to impute responsibility for a company's infringement to its parent.[100] It follows from case law that they are not even obliged to verify whether the conditions for parental liability are met.[101] The idea is that it would be seriously detrimental to antitrust enforcement if authorities were always required to ascertain who the owner of a company is and were allowed to impose a sanction only or always on that owner.[102]

The Court argues that since the power to penalise the parent for the conduct of the daughter has no bearing on the legality of a decision addressed only to the offending company, there is a choice to penalise either the infringer and/or its parent.[103] This must be taken to mean that the mere fact that an authority did not impute liability to a parent company for a subsidiary's action in a previous decision does not require the same assessment to be made in a subsequent case, and vice-versa.[104]

The principle that agencies are not bound to follow a particular exercise of discretion is equally applicable to the level of fines imposed. In regard to the EC, and despite initial indications that it could not in principle depart in a particular case from the criteria stated earlier in calculating fines,[105] it is now settled case law that it retains large margin in setting fines, as well as the relevant aggravating and mitigating circumstances,[106] and is not bound by its own past decisions.[107] Thus, a legitimate expectation cannot be based on a method of calculating fines in the competition law domain.[108]

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[100] 14.7.2011 *Total & Elf Aquitaine* 97; 2012 *Shell* 252.
[101] *Erste* 82; 13.9.2012 *Total & Elf Aquitaine* 18.
[102] 2004 *Tokai* 281.
[103] 2006 *Raiffeisen* 331; 2011 *ThyssenKrupp* 119.
[104] *PVC II* 990; 2012 *Dow* 91. *MCAA* 260.
[105] GC *KNP* 108; 2006 *Archer Daniels* 316; GC 2011 *Elf Aquitaine* 252.
[106] GC *General Química* 149-50; 2009 *Arkema* 141, 182.
[107] 1998 *Mayr-Melnhof* 368; *Michelin* 254, 292, 298; 2012 *Tomra* 104-6.
[108] *Dansk* 169-75, 191, 228-9.

Although the Court entitles authorities to rely on parental liability as they see fit from one case to another, there are some caveats to it.

Primo, the obligation to state reasons regarding the setting of a fine imposed on account of parental liability is very important, as we will detail below. Also, although the reasons for a decision that squares with a line of consistent practice may be given in summary, an explicit account must be provided if a decision goes appreciably further than previous ones.[109]

Secundo, once competition authorities select the method for calculating fines in a given case, the same method should be affirmed to all participating undertakings.[110]

Tertio, despite the flexibility that is hereby awarded, competition authorities have a great deal of interest in making use of the presumption where it proves available, because neither EU rule or principle provide that, if the addressee of a fine lacks liquidity, its parent is required to pay instead.[111] This is why, when an infringing subsidiary is insolvent, it is worthwhile making the parent liable, with or without the subsidiary[112]. However, imposition of parental liability is not dependent on the demonstration of its need to ensure effective application of competition law in a particular instance.[113]

If indeed competition agencies resort to the liability presumption, parent companies will be faced with an assumption – a 'simple' or 'rebuttable' presumption – that they actually exerted a decisive influence over their subsidiaries and, for that reason, may be held responsible for an infringement.

[109] 2001 *Silos* 28. 1975 *Papiers Peints* 31.
[110] GC 2002 *Cascades* 65.
[111] 2011 *Siemens* 201.
[112] 1991 *Anic* 242. *Cartonboard* 153, 174; *Copper Plumbing* 570; 2006 *Synthetic rubber* 372.
[113] 2011 *ThyssenKrupp* 110. Disagreeing, 2006 *Bellodi* 176; *Briggs & Jordan* 4-6, 33.

In that situation, competition authorities are not required to corroborate, by means of additional elements, the presumption, nor what it stands for, but instead it is for the party wishing to reverse the presumption to bear the hurdle of adducing sufficient evidence capable of showing that the subsidiary is independent.[114]

To debunk the presumption, general assertions are not sufficient. It must be demonstrated, by means of fact and law, either that the parent company was not in a position to exert decisive influence or that the subsidiary was autonomous, *i.e.* that the parent, although being in a position to exert influence, did not actually exert it.[115]

Therefore, at least in theory, the proof of the subsidiary's autonomous conduct on the market should suffice to refute the presumption.[116] The problem, as we will see, is that the evidentiary standard is set so high that it seems unreachable.

In any case, parents are under no obligation to demonstrate that they did not interfere in the management of the subsidiary, but solely to show that the subsidiary acted independently on the market.[117] Otherwise, given the difficulty to demonstrate negative facts, the presumption would amount to a *probatio diabolica*.[118]

The Court was ingenious in reconciling this doctrine with the presumption of innocence. It holds that the presumption does not lead to a reversal of the *burden of proof*, but lays down the *standard of proof* which must be satisfied when determining whether liability is to be attributed to a parent company.[119]

[114] *Prym* 146; CJ *Akzo* 60-1; 2012 *AOI* 46-7.
[115] *Itochu* 53; 2012 *WWTE* 37. 2006 *Fittings* 645-6.
[116] *Briggs & Jordan* 22; *Olaerts & Cauffman* 436.
[117] GC 2011 *Elf Aquitaine* 120, 171.
[118] Fn 2.
[119] Fn 1. 2009 *C. de la Torre* 16-7.

Given its refutable nature, the presumption should not lead to an automatism in attributing liability to a parent company, which would go against the principle of personal liability.[120] However, in practice, if a party does not challenge the presumption, its application and the consequent liability will become automatic.

As in the case of other rebuttable presumptions, if a fact can be lawfully presumed, it is considered to be established if the party concerned does not overturn the presumption by adducing conclusive evidence to the contrary. Accordingly, failure on the part of a parent to dispute the liability presumption, or to provide sufficient evidence that the subsidiary was autonomous, amounts to confirmation of the effective exercise of control and provides a sufficient basis for the imputation of liability and consequent joint and several responsibility for the payment of the fine imposed on the subsidiary.[121]

4.2.2 Effective exercise of decisive influence

We noticed earlier that in general it is incumbent upon competition agencies seeking to rely on parental liability, to demonstrate that decisive influence by a company over another was exercised and to borne out that contention on the basis of evidence.[122]

When authorities are unable to rest on the presumption, they will have to turn to indicia capable of inducing the said belief. Such indicia are also instrumental to parent companies wishing to reverse the presumption. In both situations, liability is not vested by share ownership but legal and economic links.

The type of evidence that is apt to discern whether a parent and a daughter constitute an undertaking is not fettered to the subsidiary's commercial policy in the strict sense, *i.e.* its conduct on the market, and it is this boundless parameter that makes parental liability appear

[120] 9.9.2011 *AOI* 92; *Transcatab* 100. 2010 *Hofstetter & Ludescher* 56; 2012 *Vandenborre & Goetz* 17.
[121] *DaimlerChrysler* 219; GC 2009 *Akzo* 93. *Candle waxes* 575.
[122] Fn 43.

inevitable.[123] As some critics point out, an undertaking is an undertaking and it is intrinsic in its very concept that a parent has the ultimate power to exercise some form of influence over a subsidiary.[124]

Several factors relating to a subsidiary's policy in the narrow sense have been considered to determine whether a parent and a subsidiary form a single group, notably the parent's influence on its subsidiary's, *v.g.* pricing policy,[125] production and distribution activities,[126] sales objectives, gross margins, sales costs, cash flow, stocks and marketing,[127] codes of conduct,[128] intra-group sales,[129] insurance policies,[130] human resources, sources of financing and computer systems,[131] head-offices[132] and employment contracts.[133]

However, these are not the only relevant factors.

Quite to the contrary, it follows from case law that, first, the subsidiary's autonomy cannot be established by alleging that the parent was not active in the infringement or encourage the illegal behaviour upon its subsidiary, or that it was not aware of it. The fact that the subsidiary or its employees have disobeyed instructions from the parent, in particular by concealing the unlawful behaviour, does not seem to undermine the foregoing conclusion.[134]

Secondly, due to the concept of undertaking, attribution of an infringement to a parent company does not require proof that it influences its subsidiary's conduct in the specific

[123] *Briggs & Jordan* 28; *Joshua et al.* 3, 5; *Vandenborre & Goetz* 17.
[124] *Wils* 103; *Montesa & Givaja* 572-3; 2008 *Hurley & Scott* 317; *Hofstetter & Ludescher* 60; *La Rocca* 75; *Horvath* 4; *Olaerts & Cauffman* 437; *Joshua et al.* 7.
[125] *ICI* 137; *Geigy* 45; *Sandoz* 45.
[126] *Commercial Solvents* 37-41.
[127] GC *Viho* 48.
[128] 2010 *AOI* 188.
[129] *Schunk* 65.
[130] 2011 *Kendrion* 57; 2011 *Gascogne* 91.
[131] 14.7.2011 *Total & Elf Aquitaine* 74; *Gascogne* 91.
[132] *Suiker Unie* 85. 2006 *Steel beams* 462.
[133] *FLS Plast* 78.
[134] GC *Otis* 87.

market on which the infringement occurred.[135] However, it has been alleged that when a parent company and a subsidiary are active on the same cartelised market, or on closely related markets, it is hardly conceivable that each of them would conduct its policy on own motion.[136] It was also argued that the premise that two sister companies are active on the same market is not such as to call into question the finding that they belong to the same group.[137]

Therefore, the subsidiary's independence is assessed on a wide basis, *i.e.* orientations as to its general commercial strategy and operations, taking account of all the relevant factors concerning the organisational, economic and legal links tying the parent to the subsidiary, which vary from case to case.[138]

Many factors have been deployed with a view to either establish or deny the existence of an effective influence by a parent over a subsidiary. Investigating these facts implies competition authorities 'drilling down' into companies' data, and we mean this in a quite literal sense.

Relevant factors

The exercise of decisive influence by a parent is confirmed where facts show that the subsidiary is not autonomous in its behaviour on the market.[139] Parents and subsidiaries in this situation are normally referred to as '*de facto* groups'.[140]

AG Kokott observed in *Akzo*[141] that, even if the examination of the autonomy of a subsidiary is carried out in the light of its commercial policy in the narrower sense, in the end the decisive factor is whether the parent, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic

[135] GC *Akzo* 83; *Gascogne* 81.
[136] 2010 *AOI* 91. *Copper Plumbing* 565, 572. *Bellodi* 174.
[137] *HFB* 65.
[138] 30/87 *Bodson* 1988 20; CJ *Akzo* 65, 74; 2011 *RKW* 116; 13.9.2012 *Total & Elf Aquitaine* 31. *Rubber chemicals* 256. *Wenner & Barlingen* 24; *Olaerts & Cauffman* 436.
[139] *Copper Plumbing* 545.
[140] *HFB* 527. *Pre-Insulated Pipe* 157.
[141] 2009 87-94.

unit. She even went on to suggest that a parent may still exercise decisive influence when it refrains from intervening at all: "*a company's mere membership of a group may influence its market conduct.*"

This approach was followed at length in later cases, where it became notorious that the idea of decisive influence was steadily replaced by that of organisational and economical links.[142]

Therefore, the main goal of the test of decisive influence is to determine whether a company has put in place mechanisms which, considered together, enable it to keep track of the activities of its subsidiary and exert effective control and influence over its commercial policy and conduct. If this is the case, then the commercial policies of both companies will be intertwined ('business links').

It is also necessary to take account of elements which make it possible to establish the existence of strong hierarchical links between the two companies, such as reporting mechanisms and the crossover of board members[143] ('personal links').

The actual exercise of management power by a parent company over its subsidiary may be inferred from the implementation of the applicable statutory provisions or from a shareholders agreement.[144] But what typically reveals the existence of organic and functional links is the fact that members of the decision-making bodies of the subsidiary are appointed by the parent.[145]

According to case law, the representation of the parent in the management bodies of its subsidiary constitutes relevant, though not decisive,[146] evidence that it exercises effective control.[147]

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[142] *EI du Pont* 62; 2012 *Dow* 77, 107. *Briggs & Jordan* 4; *Olaerts & Cauffman* 435; *Joshua et al.* 6.
[143] *Nynäs et al.* 56.
[144] *Fuji* 184.
[145] *Cassa di Firenze* 116-7; *AceaElectrabel* 51.
[146] 2011 *Arkema France et al.* 158; *FLS Plast* 80.

If a subsidiary's management body is comprised only of appointees of its parent, this has been regarded as sufficient in itself to prove decisive influence.[148] Although the Court has also found that appointing a board member does not equate to determining a subsidiary's conduct even if the appointed individual holds a similar post with the parent,[149] significance is normally attached to the presence of the parent in the management bodies of the subsidiary, albeit not substantial.[150] Nor is it crucial for there to be interlocking directors between the management bodies of the two companies.[151] The same holds for the nationality and geographical location of the subsidiary's directors,[152] the fact they exercise in parallel similar functions in other companies,[153] and actually the level of responsibility of the personnel engaged in the offence.[154] A parent company can either rely on the malfunctioning of its internal organisation to evade liability.[155]

Reliance has also been placed on the fact that a parent company has the power to renew the board of the subsidiary and chooses deliberately not to do so.[156] In other occasions though, the fact that the former members of the board remain in office has been understood as meaning that the parent had no influence on its subsidiary.[157]

Normally, when a parent company appoints representatives to the management bodies of a subsidiary this means the parent plays a significant role in essential aspects of the strategy of its subsidiary. In particular, it allows the parent to be informed of the decisions and influence them.[158] That preeminent role usually also entails reserving to the parent a power of final

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[147] *Agroexpansión* 145; *Álvarez* 18, 37-8. *Sodium chlorate* 386.
[148] 9.9.2011 *AOI* 143-4.
[149] *Gosselin* 56-7; *FLS Plast* 41-6; *FLSmidth* 38-40.
[150] 2012 *Total* 119.
[151] 12.10.2011 *AOI* 164. *Chloroprene Rubber* 427.
[152] *Avebe* 123; 9.9.2011 *AOI* 137.
[153] *FLS Plast* 53, 60.
[154] 2009 *Arkema* 129; 2009 *Elf Aquitaine* 97-8.
[155] 2009 *Hoechst* 55. *Hofstetter & Ludescher* 62.
[156] *Transcatab* 108; 12.10.2011 *AOI* 161-3.
[157] *Gosselin* 56-7.
[158] 12.10.2011 *AOI* 135. *Sodium chlorate* 386.

decision with respect to a range of matters that define the subsidiary's course of conduct on the market.[159] Investment decisions,[160] the budget[161] and the business and operating plans[162] are particularly key evidence, even if the parent's power is confined to making amendments and suggestions[163] or if it may only intervene afterwards.[164]

Compliance programmes may also turn against undertakings, since the engagement of parents in such programmes proves they believe to have the necessary means to require their subsidiaries to conduct themselves in accordance with competition rules.[165] This circumstance is aggravated if the parent is a publicly listed company in the securities market.[166]

In all these situations, it is inferred from the lack of reaction by the parent company that it is being punished for 'some sort of negligent oversight'[167] and is deemed to tacitly approve the unlawful conduct[168]. In any event, in *General Química* the CJ set aside in part the ruling of the GC for holding that an order given by a parent to a subsidiary to cease any practice which might constitute a breach of competition rules was sufficient in itself to prove decisive influence.[169]

Irrelevant factors

In a few instances the EC has attributed importance to the consolidation of the financial results of a subsidiary with those of the parent.[170] However, parent companies are usually

[159] GC *Akzo* 82; GC 2008 *Lafarge* 547; 2011 *Uralita* 45; *Gascogne* 78-82.
[160] *Commercial Solvents* 37-41; *Continental Can* 16; 7.6.2011 *Total & Elf Aquitaine* 96-7.
[161] 2010 *AOI* 211.
[162] *EI du Pont* 66.
[163] 2010 *AOI* 214-5; GC 2011 *Elf Aquitaine* 101.
[164] 2009 *Elf Aquitaine* 162.
[165] *Schindler* 88; *EI du Pont* 73. *Olaerts & Cauffman* 438; 2012 *Sarrazin* 49.
[166] *Fittings* 653, 672.
[167] *Briggs & Jordan* 36.
[168] *Avebe* 113; 12.10.2011 *AOI* 136, 149. 2011 *Jones & Sufrin* 139.
[169] CJ *General Química* 60-2; 2011 *Shell* 72.
[170] *Rubber chemicals* 262.

required to consolidate the accounts of their group,[171] so this circumstance is irrelevant to demonstrate effective influence.[172]

Another factor that in principle has no implication on the autonomy of a subsidiary, because it is purely quantitative data, is the insignificance of its turnover or activities within the group.[173]

In relation to this proposition, parent companies occasionally try to free themselves from liability by declaring their lack of interest in the offending subsidiary, which is sometimes demonstrated by the will to dispose of it. Credibility of these attempts has been challenged on the grounds that they do not imply that the parent is not interested in exercising decisive influence over the subsidiary during the period necessary to find a prospective buyer.[174]

The absence of a formal and instituted system of reporting and information exchange between a parent and a subsidiary is also likely to be neutral.[175] As the EC appositely states, entrusting individuals with concurrent positions in parent companies and subsidiaries constitutes a classic mechanism to keep information flow and coherence within the group,[176] so the best direct link in a vertical relationship comes from the presence of the parent in the subsidiary's managing bodies.

One factor that has sometimes been relevant has to do with the perception of the group image. When a subsidiary uses a group name or brand in the market, or is perceived by third parties as being part of a group, that has worked as indicia of the existence of a sole undertaking.[177] However, this exact argument was also considered insufficient to establish the subsidiary's

[171] CJ *General Química* 108.
[172] *Nynäs et al.* 55.
[173] 2009 *Arkema* 79; 2011 *Eni* 98. *Fittings* 671. *Bellamy & Child* 1329.
[174] *Kendrion* 66. *Calcium carbide* 243.
[175] 14.7.2011 *Arkema France* 78.
[176] *Chloroprene Rubber* 427.
[177] *Clearstream* 202; 2011 *Sachsa* 98-9; 2012 *Shell* 67.

autonomy[178] and even irrelevant, since it relates only to the external relations of a subsidiary and not to the internal structure of the group's organisation.[179] Conversely, the fact that the parent and the subsidiary themselves considered the latter not to be an autonomous entity is a good indicator.[180]

On top of these trifling factors, there are at least three major types of irrelevant factors that are worthwhile a closer exam.

The EC has stated that the legal responsibility of the management of a company does not necessarily coincide with the business reality.[181] This reasoning was on occasion taken to extreme consequences by holding that the obligations imposed on parent companies towards their subsidiaries as a result of national law seem to be irrelevant to assess control.[182]

Attributing relevance to national law in the context of parental liability does not hinder the principle that companies may not rely on those provisions to shield themselves from responsibility.[183] Resort to national rules should not relieve companies of the obligation to respect EU law under the principle of primacy. However, it is precisely with a view to make a correct application of this EU doctrine that national law should be taken into account.

It is crucial to keep in mind that the functioning of companies and the composition and mission of their managing bodies are largely influenced by considerations of national law. A vast majority of the indicia used to assert parental liability is based on the role played by the managing bodies of subsidiaries and their parents. This implies a given conception about companies' governing bodies and their importance, which is logically inspired by national law. Ignoring this reality is to deny the legal substance of the problem. The inconsistency is all the more blatant because the genesis of EU parental liability lies in the legal orders of

[178] 2009 *Elf Aquitaine* 165; 7.6.2011 *Total & Elf Aquitaine* 99.
[179] *Avebe* 119.
[180] *Sorinas* 499.
[181] *Copper Plumbing* 561.
[182] 2012 *United Technologies* 29, 34, 39; 13.9.2012 *Total & Elf Aquitaine* 21; AG Opinion in *Portielje* 71-7.
[183] 2012 *Elf Aquitaine* 21; *Nynäs et al.* 38.

Member States[184] and, still today, it is not unprecedented to see the EC falling back on national law when it intends to support a finding of parental liability.[185]

An additional factor that is typically disregarded concerns the daily management of a subsidiary.

Since every incorporated company has a management board,[186] the fact that a subsidiary has a dedicated local management and its own resources does not prove that that company decides upon its conduct in the market independently.[187]

It is indeed only normal that a parent company, having set up or bought a subsidiary, does not remain involved in the daily management of that company. As a result, entrusting the day-to-day business of a subsidiary to its local management and officers is a common practice and is not a decisive factor when deciding to impute liability to the parent, nor is it capable of reversing the presumption.[188] The same is true if parent companies are active in a number of countries.[189]

A slight variation of this debate concerns the so-called 'purely financial holding companies'.

The notion of holding company covers various situations but, generally speaking, can be defined as an entity that has shareholdings in one or more companies with a view to manage such participations.[190] So technically, holding companies normally have only a financial scope of business and do not exercise on their own any industrial or commercial activity. The sensitive issue is to determine whether those companies have a purely financial interest in their subsidiaries or if they act as 'corporate centres' for the group.

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[184] *ICI* p. 632; *Commercial Solvents* p. 229.
[185] *FLS Plast* 54-5. *Cartonboard* 142; 2003 *Electrical and mechanical carbon* 259; 2005 *Industrial bags* 721-2.
[186] GC *Akzo* 84.
[187] 2010 *AOI* 222; *Transcatab* 106.
[188] 2005 *Tobacco Italy* 338; *Elevators and Escalators* 623.
[189] 9.9.2011 *AOI* 130.
[190] *Schunk* 60-2.

To escape parental liability financial companies must qualify as investment vehicles, which serve merely to invest capital in companies whose commercial operations they then leave to those companies, withdrawing capital as soon as other investments provide a better return.[191] It also helps to satisfy this qualification if the subsidiary that committed the infringement concentrates, on a self-sufficient basis, all the business of the group that relates to the sector where the infraction occurred.[192] Curiously, this is an area within parental liability where the EC concedes making a parallel to the field of merger control.[193]

If these conditions are met, those companies may be deemed as financial intermediates with no links to the operational businesses of their groups. Owing to the purely financial nature of their interests, it is believed such holdings are not in a position to exercise influence over the conduct of their subsidiaries and are thus absolved from liability.[194]

Further downstream, there are holding companies that are not a form of investment[195] and that, irrespective of having a corporate object limited to the investment and management of shareholdings in other companies, may still exert decisive influence over their subsidiaries going beyond the simple placing of capital.

Therefore, it is not the corporate object of a company but rather its functional role that counts.[196] The fact that holding companies do not carry on any commercial activity may even serve to confirm that they do not constitute autonomous players.[197]

Thus, if a holding company does not operate as a pure financial vehicle, its task will typically be to consolidate shareholdings in various companies and directly or indirectly ensure they

[191] GC *Otis* 101. 2004 *Choline Chloride* 172; *Fittings* 679.
[192] *Tobacco Spain* 384; *Fittings* 680.
[193] *Tobacco Spain* 385.
[194] *Agroexpansión* 124; 12.10.2011 *AOI* 114. *Tobacco Spain* 376, 383.
[195] *La Rocca* 71.
[196] *Schunk* 70.
[197] GC *Akzo* 55.

are run as one.[198] Supposedly where a parent company plays a coordinating role between its various subsidiaries and they share an objective (that may be as general as maximising profits), the subsidiaries cannot be considered autonomous.[199]

Even equity funds may be liable for fines levied on their portfolio companies,[200] and we see no reason, contrary to *Gosselin*, why this logic should not extend to foundations whose function is to ensure the unity of management of a subsidiary, even if they carry no commercial activity of their own.[201] These entities could only escape being penalised if they lack legal personality.

In addition, parental liability does not require that the parent's business overlaps or is closely connected with that of its subsidiaries. Internal allocation of activities between different companies and divisions is a normal phenomenon within vertically-integrated groups, which is not enough to challenge the existence of a single undertaking.[202]

Finally, an argument that appears regularly before the Court, mostly driven by the EC, is the idea that when a parent company and a subsidiary 'speak with one voice' during an infringement procedure, this should bear consequences.

Based on existing precedents, it is possible to break down as follows the events capable of culminating in unity of action in this sense: *(i)* joint responses to requests for information or the SO; *(ii)* spontaneous reactions to requests addressed to the other party; *(iii)* submission of a leniency application on behalf of the entire group; and *(iv)* shared counsel representation.

The Court and the EC have been hesitating on the significance to be derived from the fact that a parent and a subsidiary act jointly at some stage in the proceedings. This circumstance has

[198] 2006 *Cassa di Firenze* 111-2; 2011 *Arkema* 44-8.
[199] 2011 *Shell* 70; *FLSmidth* 31. *Montesa & Givaja* 570.
[200] *Calcium carbide* 251-62. 2011 *Slaughter & May*; *Joshua et al.* fn 38.
[201] AG Opinion in *Portielje* 30-56.
[202] 9.9.2011 *AOI* 131. *Choline Chloride* 174.

amounted to important evidence of effective influence,[203] but was also deemed insufficient[204] or even "*entirely irrelevant*"[205] and "*superfluous*"[206] to that end.

The position that for us tends to be more just is to consider that the fact that a parent and a subsidiary present themselves as a sole interlocutor constitutes a clue that they are part of the same undertaking.[207] The fact that the two share or concentrate sensitive information is a valid indicator in our view. Nevertheless, the exact degree of appreciation granted to this fact should be modulated by the extent of the joint action of the parties throughout the procedure. If the parent and the subsidiary coordinate their actions only in a few diligences, this is likely to constitute a weak sign of the existence of a single economic unity, which must be corroborated by other evidence.[208]

4.2.3 Dual basis approach

2007's *Akzo* made it clear that full or quasi-full ownership of a subsidiary is alone and in itself sufficient to support a parental liability presumption. Prior to that point in time, it was the EC's strategy to make careful use of the presumption and support its findings of liability for parent companies on a dual basis: inferring group liability from a share capital viewpoint when applicable and establishing decisive influence on the basis of a series of elements of fact.[209]

This twofold approach is the pragmatic solution set up by the EC in order to overcome uncertainties or potential shortcomings arising from the use of the presumption on a stand alone basis ('prudent evidence'[210]).

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[203] GC *ArcelorMittal* 98-9. *Organic Peroxides* 384.
[204] 2011 *ThyssenKrupp* 127; 14.7.2011 *Total & Elf Aquitaine* 75.
[205] GC 2009 *Akzo* 111. *Ortiz Blanco et al.* 9.
[206] *Itochu* 56.
[207] CJ *Stora* 29; GC *General Química* 66.
[208] 2012 *Total* 114. *Bellodi* 178.
[209] 2010 *AOI* 118, 133-47, 202; 2012 *AOI* 49-52, 76, 135.
[210] *Agroexpansión* 131; 2010 *AOI* 96

This method goes beyond what is required by case law in full or quasi-full ownership situations because it implies waiving reliance solely on the presumption. Here, parent companies may only be held liable where there is evidence to support decisive influence.

For this reason, the Court goes on to find that, in choosing that method, competition authorities raise the standard of proof of the actual exercise of decisive influence and make it more onerous than that which would have been regarded as sufficient.[211] As an immediate consequence of this, the principle of equal treatment requires that, where the dual basis method is adopted in a particular case, that same criteria must be relied on for all undertakings involved.[212]

In the *AOI* judgments, the Court annulled the *Tobacco Spain* cartel decision precisely because the EC applied the dual basis to all parent companies, with the exception of one, in respect to which liability was attributed solely on the basis of the presumption.[213]

Having said that, it is however apparent that this line of reasoning was not always followed consistently. At least in two occasions the Court 'authorised' the EC to use different standards of review in respect to distinct undertakings in the same exact case.[214]

The increased standard of proof entailed in the dual basis approach should not mean in our opinion that competition authorities will lose the ability they have to rely on parental liability, or not, from one case to another. That approach should be mandatory only in the comparative treatment of undertakings within a particular case; it does not create any obligation or expectation for future cases. The EC seems to share this point of view.[215]

[211] 2000 *Weig* 63; 2000 *Sarrió* 97; 2012 *AOI* 53.
[212] *Agroexpansión* 133; 2012 *AOI* 54-61, 87, 137.
[213] Previous fn.
[214] 7.6.2011 *Total & Elf Aquitaine* 231-2; 2011 *Arkema France et al.* 69.
[215] *Tobacco Spain* 384.

The dual basis approach has essentially an historical background, associated to initial doubts as to whether the presumption could alone bring into play parental liability in total or near total ownership cases. Now that those doubts have vanished, this approach reflects a best practice, but there should be theoretically no interest for competition authorities to use it in modern cases, unless there are strong elements of fact and law upholding the presumption.

Probably to deal with this, the Court has put up the cryptic idea that it does not really matter what is complementarily invoked when a company owns all or virtually all the shares of another. Since in such cases the parent and the subsidiary may be liable just for reason of their shareholding links, the Court concludes therefrom that, even if the indicia relied on to support that is factually wrong or incapable or insufficient to substantiate decisive influence, still there is no ground for holding illegal the imputation of the subsidiary's infringement to the parent and it is irrelevant to examine any purported contradictions or mistakes incurred by the EC.[216]

We have great trouble understanding this case law. If a competition authority chooses to adopt a dual basis method in a particular case, this means, by definition, that it made the use of the presumption subject to the production of additional indicia. In this circumstance, the presumption and factual evidence work hand in hand, and the former cannot uphold a liability finding if it is unsupported by accurate and cogent facts.

4.3 Adequate statement of reasons

This section is principally focused on the actions of EU institutions within the framework of Article 296, § 2 TFEU.

The obligation to state the reasons regarding the setting of a fine is particularly important.[217] Whilst in general legal incorporation is not relevant in competition law, and is in fact underestimated by the notion of undertaking, when reasoning and collecting penalties are at

[216] 2011 *Siemens* 131; GC 2011 *Elf Aquitaine* 76-8, 219, 223.
[217] 2011 *Chalkor* 61.

stake, the entity to which a decision is addressed must possess legal or natural personality so that if needed enforcement proceedings can be taken pursuant to Article 299 TFEU.[218]

Accordingly, an infringement of EU competition law must be imputed unequivocally to a person and, when the SO and the final decision are served, they must be addressed to that person and indicate in which capacity he is called on to answer for the unlawful behaviour.[219]

Where an antitrust decision relates to a plurality of addressees it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who bear liability for the infringement.[220]

In parental liability, these requirements translate into the need, first, for the parent to be included, along with the subsidiary, among the addressees of the SO and the decision, each taken separately and individually.[221] The fact that the parent is aware of the SO or the decision addressed to its subsidiary does not ensure observance with the parent's rights of defence and does not allow it to answer the charges levelled against it.[222]

In order to contain suitable reasoning in regard to a parent company, the SO and the decision must also embrace a detailed explanation for imputing the infringement to it.[223] It must be clear that the parent is being declared jointly and severally liable for payment of a fine imposed on the subsidiary, and the reasons (presumption of decisive influence, evidence of influence or a combination of both) why a finding of liability is made against it and why fines are imposed.[224]

[218] *PVC II* 978; Opinion of AG Kokott in *ETI* 68-9. *Cartonboard* 141. *Montesa & Givaja* 558.
[219] GC *SCA* 53; CJ *ARBED* 21; CJ *Akzo* 57.
[220] 2011 *Air liquide* 65; 2011 *Grolsch* 77; CJ 2011 *Elf Aquitaine* 152.
[221] GC 2011 *Elf Aquitaine* 143.
[222] CJ *ARBED* 22-4. *Montesa & Givaja* 558.
[223] *Grolsch* 78; 2012 *AOI* 75.
[224] 2012 *AOI* 76-9; 13.9.2012 *Total & Elf Aquitaine* 49.

This is an essential feature of companies' rights of defence and a key procedural requirement.[225] Even though the presumption is enough to sustain parental liability, if no express reference is made to it, this equates to violating the duty to state reasons.[226] The same happens if no satisfactory explanation is given as to why the potential arguments adduced to rebut the presumption fail to reach that purpose.[227] Important cartel decisions have been annulled because of this.[228]

In any event, this requirement needs to be reconciled with other lines of case law.

First, competition authorities, in particular the EC, have no obligation to address investigative measures, *v.g.* information requests or on site inspections, to both the parent and the subsidiary.[229] Similarly, in situations in which parental liability lies solely on the presumption, it is not necessary to submit evidence other than proof relating to the shareholding of a parent in its subsidiary.[230]

Secondly, competition authorities, in particular the EC, are not obliged to take position on all the arguments relied on by the parties and it is sufficient if they set out the facts and the legal considerations having decisive importance in the case.[231]

In the Court's eyes, the EC is not required to devise its standing on arguments which are manifestly irrelevant or insignificant or plainly of secondary importance to assert if a parent and a subsidiary constitute a single undertaking.[232] In situations of full and quasi-full ownership, it looks as if a general standing, according to which the presumption is sufficient

[225] 2001 *France* 35. *Vandenborre & Goetz* 18.
[226] *Fuji* 164-70. *Gouveia* 2011; *Samadi* 2011.
[227] CJ *General Química* 60-2; 14.7.2011 *Total & Elf Aquitaine* 149; 12.10.2011 *AOI* 173.
[228] *Air liquide* 70-80; 2011 *Edison* 71-88; *Grolsch* 84-92; CJ 2011 *Elf Aquitaine* 144-70.
[229] GC 2011 *Elf Aquitaine* 139-48; 14.7.2011 *Total & Elf Aquitaine* 118-20.
[230] CJ *Akzo* 64.
[231] 1997 *Siemens* 16; 1998 *Sytraval et al.* 63.
[232] *Continental Can* 6; 1992 *Shell* 319; 13.9.2012 *Total & Elf Aquitaine* 51-2.

to impute liability to a parent company and the arguments essayed to the contrary do not go to the presumption, meets with the applicable test.[233]

On the one occasion in which the Court considered such a generic assertion as insufficient grounds for reasoning it was because the contested decision concerned the *MCAA* cartel, which was one of the first cases where the EC relied fully and solely on the presumption to support parental liability.[234] Apart from this episode, there is apparently only a need to take a position on contrary arguments that are significant to assess a subsidiary's independence.[235]

4.4 Allocation of liability

If an infringement of Articles 101 and 102 TFEU is established, liability may be imputed to the parent company of a group, to the subsidiary responsible for the infringement or jointly and severally to both.[236]

However, the fact that a parent is responsible for the conduct of a subsidiary does not mean that it is regarded as having carried out that conduct, nor in any way exonerates the subsidiary of its own responsibility. The subsidiary remains individually accountable for the anticompetitive practices in which it took part[237] and responsibility on the part of the parent is additional.[238]

[233] 7.6.2011 *Total & Elf Aquitaine* 193-5; 2011 *Arkema France et al.* 137-9.
[234] CJ 2011 *Elf Aquitaine* 158-70; 7.2.2012 *Total & Elf Aquitaine* 58. 2011 *Harms*.
[235] *Air liquide* 71; *Edison* 72-7; 2011 *ThyssenKrupp* 136.
[236] 2011 *Pegler* 103. *Industrial bags* 577. Against, *Bellodi* 176.
[237] 2011 *Siemens* 196.
[238] *Industrial bags* 588.

4.4.1 Allocation within the group

The presumption of parental liability applies not only in the case where there is a direct relationship between a parent and a subsidiary, but also where that relationship is indirect due to the interposition of an intermediary company.[239]

It follows that in the specific case where a company holds all, or almost all, the capital of an interposed company which, in turn, holds all the capital (or close to it) of a subsidiary, there is a rebuttable presumption that the top company exercises decisive influence over the interposed company and, via this company, over the last subsidiary. Consequently, the ultimate parent company may be liable for the conduct of the offending subsidiary, unless it demonstrates that either the interposed company or the subsidiary operate independently in the market.[240]

Since the liability presumption applies to top and intermediate companies, this is true *a fortiori* when decisive influence is demonstrated to have actually occurred by means of factual evidence, regardless of the percentage of capital held by the final and interposed companies. Therefore, a company may be held liable for the sins of its subsidiary, whose capital it does not hold directly, in so far as that company exercises decisive influence over the said subsidiary, even indirectly. In such a situation, the holding company, the interposed company and the last subsidiary constitute a single undertaking.[241]

These considerations are equally applicable if the 'grandparent', *i.e.* the head of the group, is a natural person[242] or a combination of several persons, natural or legal.[243] It matters little in this context if trustees come into play in the group chain.[244]

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[239] CJ *General Química* 90; *Eni* 102; 2012 *Shell* 52.
[240] CJ *General Química* 88-9; *FLSmidth* 23-4.
[241] CJ *General Química* 86-7; *FLSmidth* 22.
[242] *HFB* 55-61 (upheld in *Dansk* 113).
[243] *Hydrotherm* 11.
[244] *HFB* 58.

Conversely, if the entity participating in the infringement has neither natural nor legal personality, *v.g.* because it is an unincorporated business unit within a group, liability has to be directed against the top entity with legal personality of which that entity forms part.[245]

In a situation where there are large numbers of operating companies participating in an infringement and belonging to the same group, the infringement may be imputed to the company at the head of the group.[246] In the absence of a person to which liability could be assigned, the question arises as to whether the component companies may be liable for all the acts of the group. This calls upon the issue of the liability of 'sister companies'.

Admittedly, the simple fact that two companies are held by the same entity is insufficient to establish that they are an economic unit with the result that the actions of one company can be attributed to the other and that one can be liable to pay a fine covering the acts of the other.[247]

In any event, imputation of liability to a sister company of the offender is possible as long as the parent company common to both has decided to entrust the former with the task of coordinating the group's business or at least the part covered by the infringement.[248] Moreover, the Court is of the view that, where a company is supervised by a sister, it is legitimate to assume that it was the common parent that entrusted those supervisory powers to the affiliated company.[249]

In this case, the liability presumption does not apply, since a sister company is not a subsidiary. For the same reason, this is neither a question of parental liability. However, under the referred conditions, a group company may, alone[250] or with its parent,[251] be held jointly and severally liable for the conduct of a sister company, although it is not its own subsidiary.

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[245] 2011 *Arkema France et al.* 62. *Bellamy & Child* 104-5.
[246] *PVC II* 989; 2012 *Shell* 52. *Bellodi* 175.
[247] CJ *Aristrain* 99; *Dansk* 118.
[248] CJ *Aristrain* 96-101; *Dansk* 119-20; *Jungbunzlauer* 120, 125-9. *Pre-Insulated Pipe* 160.
[249] *Nynäs et al.* 52.
[250] *HFB* 66.
[251] CJ *ArcelorMittal* 104. *Copper Plumbing* 556.

The great benefit of this case law is that there is no need to establish the whole chain of responsibility within a group and to address the SO and the decision to all its companies.

4.4.2 Succession issues

The basic temporal rule is that liability is assigned to parent companies *pro rata temporis*, *i.e.* to the extent of their own involvement with the infringing subsidiary. However, application of this rule may prove difficult in certain circumstances, and complex questions may arise as a result of structural changes in the control of an undertaking. The main problems and solutions are schematically presented along these lines.

There is no express provision covering the issue of responsibility for a competition law infringement following corporate restructuring or acquisition. It would however be impermissible for undertakings to avoid liability because of a corporate reorganisation,[252] so liability succession has been determined in the light of EU law principles.[253]

As a rule, it falls to the natural or legal person managing a company when an infringement is committed to answer those charges, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the company in question.[254]

When, between the commission of an infringement and the time when the undertaking at hand must answer for it, that undertaking goes through a corporate change, parental liability is allocated by means of a dual criterion: the 'legal continuity test' or the 'economic continuity test'.[255]

[252] *ETI* 41.
[253] *Cartonboard* 144.
[254] CJ *Stora* 37; *HFB* 103; *Pegler* 101.
[255] 1999 *Anic* 139, 145; *Uralita* 68. *Cartonboard* 145. 2012 *Jalabert-Doury* 95.

Legal continuity test

If the person managing the undertaking disposes of the company or assets which contributed to the infringement, he continues to be answerable for the infringement, provided he is still in existence at least until the final decision in the procedure[256] and even if he has withdrawn in the meantime from the market in question.[257]

On the back of this, responsibility for the period up to the divestment does not pass to the acquirer but remains with the first group.[258] Hence, there is no case of an 'innocent' purchaser becoming fixed with liability solely by reason of having acquired an infringing undertaking.[259]

Historically, there were a few circumstantial deviations from this rule, which is the expression of the principle of personal liability.[260] However, we think the Court was able to ring fence those situations and keep the fundamentals of this principle, coupled with the notion of undertaking, at the core of its case law.

In several cases the Court said the fact that the acquirer knows of the involvement of the target in an unlawful behaviour should concur to hold it liable for the past infringement of the subsidiary.[261] However, the prevailing thesis is that the fact that an acquirer is aware, or could not have been unaware, that the acquired company participated in an infringement before its acquisition does not suffice to impute to it the unlawful conduct prior to the acquisition.[262]

On a different instance the Court went on to consider that the EC was exceptionally entitled to impute to a purchaser liability for the unlawful conduct of the seller because the acquirer had

[256] 1991 *Anic* 238; CJ *Stora* 37-8; 2011 *Siemens* 141. *Cartonboard* 145; *Industrial bags* 700.
[257] *ETI* 37. *MCAA* 222; *Chloroprene Rubber* 406.
[258] CJ *KNP* 66-8; 14.7.2011 *Total & Elf Aquitaine* 168.
[259] *Cartonboard* 145-6; *MCAA* 220.
[260] Fn 2.
[261] 1998 *Cascades* 157-8; *Mayr-Melnhof* 397-8, 403; *Erste* 83.
[262] CJ *Stora* 39; 2002 *Stora* 60; *FLSmidth* 25-6. *Bellamy & Child* 1331.

accepted liability for the seller's actions prior to taking over the assets concerned.[263] Again, it was clear that, in so far as such a situation constitutes an exception to the principle of individual liability, it would be interpreted strictly. Hence, the Court subsequently ruled that a contractual instrument cannot be relied upon in order to escape penalties incurred under EU law inasmuch as it seeks to apportion liability between companies.[264]

Different conclusions are reached when a business is transferred from one company to another, in cases where transferor and transferee are connected by economic links, that is to say, when they belong to the same undertaking. Indeed, when an entity that has breached EU competition provisions is subject to an intragroup change, that change should not create a new undertaking free of liability for its predecessor's infringements.[265]

In such cases, liability for past behaviour of the transferor may be passed on to the entity that succeeded it, notwithstanding the fact that the first remains in existence.[266] Imposing a penalty for the infringement on the successor can thus not be excluded simply because it has a different legal form or name.[267] The circumstance that the decision to transfer the relevant activity or company is imposed by law is equally irrelevant.[268]

There were nonetheless two occasions in which the Court did not follow this approach. In the *PVC II* case, the GC held, without being contradicted by the CJ, that "*the transfer of the branch of business activity* [accountable for the breach] *to subsidiaries has no impact on the determination of the undertaking responsible for the infringement*".[269] On a second occasion, the Court addressed those principles directly but intentionally opted for not relying on them because of the formalistic argument that the parent company of the group concerned was not held liable for the infringement of its subsidiaries, and for this reason, and also in the absence

[263] 2005 *ThyssenKrupp* 81-2.
[264] 2009 *Hoechst* 65; *Areva* 140. *Briggs & Jordan* 2.
[265] 1984 *CRAM* 9; 9.9.2011 *AOI* 216.
[266] 2004 *Aalborg et al.* 356-9; *ETI* 45-52; *Pegler* 55. *Chloroprene Rubber* 407.
[267] *CRAM* 9; *ETI* 41, 43. *Copper Plumbing* 571. 1998 *Kerse* 295; 2010 *Van Bael & Bellis* 1156.
[268] *ETI* 44.
[269] *PVC II* 957-8.

of evidence that this was a strategy to avoid penalties, the transferee could not be imputed with liability which was not previously established.[270]

Based on this line of reasoning, some doctrine sustains that liability may also fall to the successor if the succession is a proven attempt to circumvent liability.[271]

Alternatively, if the acquired subsidiary carries on the infraction after its acquisition, liability for the infringement is apportioned between the seller and the acquirer (if parental liability can be established in both cases), each undertaking being responsible for the respective period in which the subsidiary participated in the unlawful conduct.[272] The fact that the new parent only held control over the subsidiary in the final stage of the infringement does not exclude its liability.[273] However, the mere fact that an employee which participated in an infringement is seconded to another company does not imply that the latter automatically becomes an infringer.[274]

Economic continuity test

When the person that was in charge of the infringing undertaking prior to its disposal ceased to exist in the interim, it is necessary to find the combination of physical and human elements which contributed to the commission of the infringement ('legal package'[275]) and to identify the person who has become responsible for their operation.[276]

It has been considered that the disappearance of the person previously in charge of the offending undertaking brings under the same wing situations in which it has ceased to exist at

[270] *HFB* 105-8.
[271] *Sorinas* 504; *Horvath* 7.
[272] 2011 *Siemens* 139. *MCAA* 223; *Chloroprene Rubber* 406.
[273] 14.7.2011 *Total & Elf Aquitaine* 176.
[274] 2011 *Dow* 93.
[275] 1991 *Anic* 232.
[276] 1991 *Anic* 237; *PVC II* 953; *Uralita* 57.

law or economically,[277] given that a penalty imposed on a company that continues to exist in law but has ceased economic activity or is incapable of paying the fine is likely to have no deterrent effect.

If the initial parent company simply disappeared, the acquirer of the 'legal package' will answer for the whole period of the infringement.[278] It is for competition agencies to prove that on the date the decision is adopted there is no legal person to whom the offending conduct of the subsidiary prior to acquisition could be imputed.[279]

If the parent ceased to exist but has been merged with, or absorbed by, another entity, the latter will remain liable for the past infringement, even if the 'legal package' was transferred to third parties.[280]

In both situations, the acquirer assumes the rights and obligations of the dissolved entity and is treated as its economic successor.[281] Unlike internal restructurings, where there are two successive legal forms of one and the same undertaking that simply changed name or form but continued to exist with its economic and functional characteristics essentially unchanged, in that case the acquirer is only liable for past behaviours because there is obvious economic continuity between two distinct undertakings. There being no legal, economic continuity is considered necessary for the acts of the former undertaking to be imputed to the new one.

Some case law is dubious as to whether the economic continuity test should be triggered by the disappearance of the initial parent company or of the infringing subsidiary. Certain judgments even suggest that it should be the latter.[282] In our view, the status of the subsidiary is irrelevant for this purpose. If a subsidiary no longer exists after its acquisition, merger or absorption, the former parent continues to be liable for the infringement prior to that event, as

[277] 1999 *NMH* 47-8; *ETI* 40; 2011 *Polimeri* 129. *Sorinas* 503-4.
[278] *ETI* 37; 9.9.2011 *AOI* 218. *MCAA* 221; *Chloroprene Rubber* 406.
[279] GC 2002 *Stora* 72.
[280] *Raiffeisen* 326; 9.9.2011 *AOI* 219-21. *Industrial bags* 583.
[281] *Suiker Unie* 80, 84-7; 2009 *Hoechst* 51. *Bellodi* 171.
[282] CJ *Stora* 38.

long as the parent itself continues in existence.[283] What matters for the application of the economic continuity test is the disappearance, on the date of a decision, of the parent company responsible for the operation of the subsidiary during the infringement. It can only be different if the entity that participated in the infringement did not form an undertaking with its parent or did not belong to a vertically integrated group, but acted on its own right.[284]

In sum, when a company or activity is transferred, responsibility for an antitrust infringement normally rests with the transferring entity. There can be assignment of past responsibility only in exceptional circumstances, *e.g.* if the transferor ceased to exist after the infringement or if the transferor and the transferee belong to the same group.

In any case, the subsidiary that committed the violation continues to bear responsibility for its actions prior to acquisition.[285] As is the case with group relationships where competition authorities may choose to penalise the subsidiary or the parent, that choice is also available in liability succession.[286] That being the case, it is possible to impute the subsidiary's conduct to the former parent company, alone or jointly with the subsidiary or with the new parent company if admissible. By contrast, given the personal nature of infringements, the purchaser may only be liable in the limited circumstances mentioned above.

Anyhow, it does not seem incompatible with this principle to impute responsibility only to the subsidiary even if that means, because it was in between acquired by a third party, that the financial consequences of the penalty end up being borne by the purchaser, who is unconnected with the infringement.[287]

[283] 2002 *Stora* 70. *Horvath* 7.
[284] 2011 *Siemens* 139.
[285] CJ *Cascades* 79; 2011 *Siemens* 139.
[286] *Erste* 82; *Uralita* 59, 61.
[287] *Raiffeisen* 334.

4.5 Specificities in setting fines

This section is particularly focused on the legal criteria followed by the EC in applying Regulation 1/2003, although European competition authorities usually follow closely the EC's practice when applying fines in procedures involving Articles 101 and 102 TFEU.

4.5.1 General remarks

According to Article 23(2) of Regulation 1/2003, undertakings infringing Articles 101 and 102 are exposed to hefty fines up to 10% of their total turnover in the last business year. When several companies are jointly and severally liable for a fine on the grounds that they form a single undertaking, that will have a huge impact on the amount of the fine.

The most direct result of this is that the 10% ceiling does not apply to the individual turnover of each of the companies involved in the offence, rather it is calculated on the basis of the worldwide turnover of the undertaking concerned, *i.e.* of all its constituent parts taken together.[288] The reason behind this is that the overall turnover of an undertaking gives an indication of the size and economic power of the entity in question and the influence it is able to exert in the market.[289]

Therefore, the criteria for assessing the gravity of an infringement may encompass, apart from the volume and value of the goods and services in respect of which the infringement was committed, the size and power of an undertaking.[290] A fine merely reflecting the market share of an undertaking could fail to consider the real strength of the group, especially when the offender operates under the influence of a parent company.[291]

[288] *HFB* 528; 2005 *Tokai* 390; 2012 *YKK* 192. *Tobacco Spain* 441.
[289] GC *Akzo* 90; 9.9.2011 *AOI* 211.
[290] *Jungbunzlauer* 214; *Raiffeisen* 359-61.
[291] GC *SCA* 184; GC 2011 *Elf Aquitaine* 290. *Tobacco Spain* 422.

The turnover to be taken into consideration when calculating the 10% ceiling is that of the group as a whole, including the companies that are not implicated in the violation.[292] It has even been considered that intra-group sales should be included for these purposes,[293] which clearly seems excessive given that the proceeds of internal transactions are unrelated to the market value and economic weight of an undertaking.

As far as an infringement is the object of collective liability, it is necessary to consider how seriously each company participated in it.[294]

Aggravating factors

Where an infraction involves several undertakings and there is considerable disparity between their comparative sizes, differential treatment may be applied in order to take account of the actual economic ability of undertakings to cause significant damage to competitors and to set the fine at a level which ensures that it has a sufficiently deterrent effect.[295]

If this would not be the case, it would be open to a large undertaking to escape from fines by creating subsidiaries with little turnover to engage them in illegal behaviour. Imposing a sufficiently high fine on a large undertaking is likely to deter that behaviour. To the extent consistent with this purpose, large undertakings are in a different situation from smaller ones, in that a difference of treatment appears objectively justified.[296]

To this end, the EC is authorised to apply a 'multiplier' based on the overall turnover of an undertakings when its dimension and global resources are such that, unless the amount of the fine is adjusted this would not have a deterrent effect, as it would be too low a fraction of the

[292] T-26/06 *Trioplast* 115; 2011 *IBP* 101; *Gascogne* 111-3.
[293] 1998 *Europa Carton* 128; CJ *KNP* 61-2.
[294] *Suiker Unie* 623; *FLSmidth* 83.
[295] *Jungbunzlauer* 216; 2012 *Elf Aquitaine* 86. 2006 EC *Guidelines on fines* 30.
[296] 9.9.2011 *AOI* 252. Against, *Briggs & Jordan* 31-2; *Hurley & Scott* 303, 320; *Hofstetter & Ludescher* 73; *La Rocca* 74; *Olaerts & Cauffman* 437.

turnover.[297] It is also considered that, due to their legal and economic knowledge and infrastructures, undertakings in this situation are more easily able to raise the necessary funds to pay the fine[298] and to acknowledge the illegality and results of their behaviour.[299]

It follows that, in parental liability cases the global turnover of an undertaking is a crucial element to be factored into the maximum amount and the 'deterrence multiplier' of a fine.[300]

If reliance is placed on the turnover of an undertaking, several theories have been followed to determine the appropriate period to reflect its true size and power or the scale of the infringement it committed.[301] Despite the method which is followed to determine the power of an undertaking and the deterrence factor, it needs to be applied consistently to all undertakings participating in an infringement,[302] including within the same group,[303] and the turnovers resulting thereof must adequately reflect the economic reality and capacity it seeks to capture.[304]

As to the 10% ceiling, since it aims *inter alia* to shield undertakings against excessive fines,[305] it must refer to the overall turnover of the undertaking concerned in the financial year immediately preceding the decision.[306]

And can the fine imposed on the parent jointly and severally with the subsidiary be heavier or lighter than that levied on the latter? In principle, no; both companies should be liable for the same amount, subject only to any aggravating or mitigating circumstances that may apply in

[297] CJ 2010 *Lafarge* 104; *Agroexpansión* 207-8. *Tobacco Spain* 415, 423.
[298] 2006 *Showa* 18; 2011 *WWTE* 108.
[299] *Areva* 355; *Pegler* 124.
[300] *Jungbunzlauer* 367; *YKK* 204. *Montesa & Givaja* 556.
[301] 2008 *Hoechst* 379, 382; *Areva* 351; 2011 *Siemens* 125-6; 9.9.2011 *AOI* 257; *Agroexpansión* 194-5, 210; *Kendrion* 91. 2009 *Heat stabilisers* 739-40.
[302] 1998 *Fiskeby* 42; *Kendrion* 109.
[303] T-40/06 *Trioplast* 95-7; *Pegler* 132-3.
[304] 2007 *Britannia* 25, 29-30; 2011 *Dow* 133.
[305] 2005 *Tokai* 389.
[306] 2005 *Tokai* 389; *Kendrion* 91.

respect to just one of the parties[307] and the fact that, because of a succession incident, a parent company should be responsible only for part of the infringement.[308]

Another aggravating factor that may be relevant hereunder is the omission of information or the provision of incorrect or misleading information as to the links between the companies of a group with a view to evade parental liability or render its detection more difficult.[309]

Recidivism is also an important factor.[310] There is however a subtle distinction between the consequences and the findings of repeated infringements.

Because of the principle of individual liability, if a company belonged to several undertakings and only some of these are repeated offenders, they are the only ones liable for a recidivist penalty, imposed as a separate fine.[311] Yet, due to the notion of undertaking, it is possible to find recidivism when two different companies belonging to the same group are censured for the same type of infringement on different occasions,[312] provided that interplay between those companies is well established.[313]

Mitigating factors

The relevance of attenuating circumstances specific to parental liability is limited; *e.g.* the fact that a parent company did not participate in the infringement perpetrated by the subsidiary,[314] was not aware of it,[315] displayed negligence in controlling the latter,[316] disposed of the

[307] 2011 *Siemens* 252; *Kendrion* 110-1.
[308] 7.6.2011 *Total & Elf Aquitaine* 209; *Gascogne* 115.
[309] *HFB* 555-64.
[310] 1992 *Shell* 369; *Michelin* 293.
[311] 7.6.2011 *Total & Elf Aquitaine* 213; 2011 *Arkema* 70-86. *Methacrylates* 369.
[312] *Michelin* 290; 2012 *Shell* 248-64.
[313] *Eni* 166-71; *Polimeri* 299-303; 2011 *ThyssenKrupp* 308-23. 2011 *Sarrazin* 90; 2011 *Debroux* 90-1, 95; 2012 *Italianer* 5-6.
[314] *Kendrion* 97.
[315] GC 2011 *Elf Aquitaine* 295; *FLSmidth* 55.
[316] GC 2011 *Elf Aquitaine* 315.

subsidiary at a later stage,[317] has left the market concerned[318] or mobilised no resources to the infraction[319] play no role in this context.

As concerns leniency, the rule is that in the absence of an announced intention by the parent and the subsidiary to jointly cooperate in the procedure,[320] the application, the submission of evidence, the contribution to the programme and the benefits thereof are individually assessed and ascribed in respect to each of the group companies.[321]

Two final issues of utmost significance are the effects of the limitation period and of the annulment of decisions in parent-subsidiary relationships.

In respect to the first issue, the Court attaches an *erga omnes* effect to the *interruption* of the limitation period, which applies not only to the subsidiary but also to its parent.[322] As for the *suspension* of the limitation period, the EC developed a theory of 'cross application' of suspensive effects in parental liability, on the basis of which the submission of an appeal by a company would suspend the limitation period for all the group.[323] The Court rejected this and held that the suspension produces only an *inter partes* effect so that the company which is a party to judicial proceedings is the only in respect of which the limitation period is suspended, even in cases of parental liability.[324]

As regards the scope of the annulment of EC decisions, since the basic imperative is that the Court cannot rule *ultra petita*,[325] an eventual pronounced annulment may not operate to the advantage of those who did not file an appeal.[326] There is though an interesting twist of this

[317] *Areva* 200; 7.2.2012 *Total & Elf Aquitaine* 80-3.
[318] *FLS Plast* 147.
[319] 2011 *Arkema France et al.* 214; 14.7.2011 *Arkema France* 117-8.
[320] *Organic Peroxides* 384; *Fittings* 685. *Bellamy & Child* 1316-7.
[321] 2009 *Hoechst* 75; *FLSmidth* 88-9.
[322] CJ *ArcelorMittal* 110.
[323] *Steel beams* 451.
[324] GC *ArcelorMittal* 151-8.
[325] 1962 *Meroni* p. 419; 1972 *Jamet* 12.
[326] 1999 *AssiDomän* 52-3; *FLSmidth* 42.

rule in parental liability cases. If the Court has before it actions for annulment filed separately by a parent and a subsidiary, it may take into account the outcome of the action brought by the subsidiary, if the form of order sought by the parent has the same object.[327]

4.5.2 Succession of undertakings

Whilst fines imposed on various companies belonging to a single group throughout the infringement are calculated on the basis of the economic power of that group, the rule in succession cases is that if an undertaking that committed an infringement is subsequently broken up or sold on, each addressee of the decision is entitled to have the 10% ceiling applied individually to it at the date of the decision.[328]

Thus, if a company belonged to different undertakings successively, it is necessary to impose on that company a fine made up of two separate amounts for each of the periods corresponding to the time it belonged to the different undertakings, in order to determine in an appropriate manner the amounts to be paid by the several companies.[329]

However, penalty allocation in succession cases has proved to be particularly sensitive for the EC.

When a company acquires another and had not had the time to assume control of it between acquisition date and termination of the infringement, the EC should waive a fine on the parent.[330]

Another interesting situation is that in *Gosselin*, where the GC annulled the *Removals* cartel decision. The GC treated this as if the parent "*managed to rebut the presumption that it exerts*

[327] 2011 *Tomkins* 42-5.
[328] 2005 *Tokai* 390; *FLS Plast* 138-9.
[329] 2011 *Siemens* 241; *Agroexpansión* 202.
[330] GC *SCA* 50. 1984 *Flat-glass Benelux* 54.

a decisive influence over [the subsidiary]",[331] but this was not really the case. The head of the group was a foundation with no economic activity, whose certificates were only issued and governing bodies only met for the first time after the infringement has ceased. Assuming that no other informal links existed to demonstrate decisive influence,[332] this should be treated as a situation of succession of undertakings.

In the *Industrial Bags* and *Gas switchgear* cartels, the EC was faced with complex succession issues and, for the sake of ease, took the view that it could freely arrange the amounts to be paid by the several entities. The GC rejected this position, stating that joint and several liability for payment of a fine can only cover the period of infringement during which a parent and a subsidiary form a sole undertaking. For the Court, it follows from the principles of legal certainty and individual liability that each company must be able to discern from the decision the period for which it is liable and the exact amount of the fine which it must pay in respect of that period.[333]

In *Areva* the Court followed exactly the same *dicta* but remarked that, because companies are allowed to make a claim for recovery against co-debtors, they are able to determine this way their share of the fine.[334]

In a case of successive parental liability, the amounts to be paid by the successive parents should, in so far as possible, reflect the weighting of their individual shares of liability.[335] However, those amounts do not need to be set in a manner which is strictly proportionate to the duration of the infringement.[336] Although this might resemble difficult to reconcile with some existing case law,[337] it is reasonable that fines imposed on various companies, accused

[331] *Gosselin* 53-8.
[332] AG Opinion in *Portielje* 70-7.
[333] T-40/06 *Trioplast* 167-70; 2011 *Siemens* 121, 152-66. 2010 *Alvim* 7.
[334] *Areva* 214-7, 236.
[335] 2011 *Siemens* 154.
[336] T-40/06 *Trioplast* 168; 2011 *Siemens* 162, 181-2.
[337] 1978 *United Brands* 302; 1997 *Deutsche Bahn* 127; T-26/06 *Trioplast* 69.

of participating in the infringement for different periods of time and in different circumstances, may not be mathematically equal to the duration of their involvement.

Also, although the date on which the succession occurred can be easily traced, the concrete turnover taken into consideration in respect to each of the successive parents depends on the period the EC deems relevant for this purpose.[338]

While it is only possible to consider the consolidated turnover of an undertaking if the parent exercised decisive influence over the subsidiary during the relevant period,[339] there is nothing preventing a company which does not form an undertaking on the date the decision is adopted from being liable for past infringements.[340]

Therefore, when an infringement is committed by a subsidiary which has belonged to various groups, the combined value of the fine ascribed to the parents may well be greater than that inflicted on the subsidiary,[341] provided the 10% threshold is respected when the decision is issued.[342] That can be the case, *e.g.* if at the day the decision is adopted, the subsidiary belongs to a group that is smaller than that of one of its previous parents or is not even vertically-integrated[343] or if it is the other way around.[344]

4.6 Enforcement of joint and several holdings

Areva and *Siemens* are the leading cases in this matter.[345]

Here, the Court considered that where several persons are liable for an infringement, they must be so on a joint and several bases. Even though the nature of the payment obligation on

[338] Fn 301.
[339] *Fuji* 59; 2012 *WWTE* 19-20.
[340] *Areva* 206.
[341] T-26/06 *Trioplast* 72; T-40/06 *Trioplast* 76; *FLS Plast* 99.
[342] *Kerse* 329.
[343] *Kendrion* 87-9, 93, 98, 107.
[344] *Sachsa* 108.
[345] *Areva* 204-17, 236, 257; 2011 *Siemens* 149-59.

companies in that situation differs from that of joint debtors of a private-law obligation, the Court deemed it appropriate to seek guidance in the national rules on joint and several obligations. Hence, in the absence of an indication in the decision that certain companies are more responsible than others for the offence, it is assumed that the wrongdoing is attributed to each company in equal measure and each should contribute in equal amounts to the fine.

Under this system, the EC is allowed discretion, as per Articles 291(1) and 299 TFEU, to call on all or part of the fine from one or other of the legal persons concerned until its right to recover is extinguished.[346] Logically, the amount of the debt reduces on any payment by any party; there is no 'double counting'.[347] Similarly, payment of the full amount of the fine by one company cancels the obligation on the others,[348] without prejudice to the ability of the former to make a claim against its co-debtors to pursue recourse for the sums it might have paid in excess of its share.

5. CONCLUSIONS

It is now easy to understand just why it is so difficult to succeed in disproving a finding of parental liability. In total or near total ownership cases, competition authorities need to put forward neither argument nor evidence serving to found effective influence. Where such influence is demonstrated or corroborated by evidence, still it will be problematic to prove the autonomy of a subsidiary whose capital is largely in the hands of a single shareholder. Even in cases where subsidiaries admittedly enjoy great autonomy ("*grande autonomie*")[349] or qualify as full-function joint ventures, that may not do to discharge parental liability.

In a limited number of instances the Court annulled EC's parental liability findings on the grounds of inconsistent or insufficient reasoning.

[346] T-40/06 *Trioplast* 165. *Kerse* 328-9.
[347] T-40/06 *Trioplast* 79; *FLS Plast* 188.
[348] *Pegler* 106.
[349] *Gascogne* 74.

These concerned essentially: *(i)* erroneous application of the dual basis method;[350] *(ii)* imputation of parental liability to a company holding 60% of the share capital of another without establishing to the requisite legal standard the actual exercise of control;[351] *(iii)* wrong allocation of liability among successive parent companies;[352] *(iv)* holding a sister company liable for the actions of the offender without demonstrating the existence of managerial control over it;[353] *(v)* failure to identify the presumption as the legal basis for embracing the parent in liability;[354] *(vi)* lack of adequate reasons explaining why the presumption should hold against opposing arguments;[355] *(vii)* incorrect application of a penalty for 'group recidivism'.[356]

However, the errors committed by the EC in these cases were non recurrent methodological slips and do not contend with the substance of this doctrine. The EC itself acknowledged to have taken careful note of the Court's warnings and extra steps to ensure that the reasons supporting parental liability are clearly spelled out.[357]

AG Kokott identified in *Akzo* three scenarios which could be eligible for rebutting parental liability: the parent company behaves like a pure financial investor; the parent holds 100% of the shares in the subsidiary only temporarily; the parent is prevented for legal reasons from exercising its control.

However, the only argument that was ever capable of toppling parental liability on its merits was the purely financial nature of a parent company.[358] Oddly or not, this has happened just once and it was in a dual basis case, so the presumption rests undefeated.

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[350] Fn 212.
[351] *FLS Plast* 36-46; *FLSmidth* 37-40.
[352] Fn 303, 331-333.
[353] Fn 247.
[354] Fn 226.
[355] Fn 228.
[356] Fn 313.
[357] *Italianer* 5.
[358] Fn 194.

Hope for a successful breakthrough in regard to financial investors is even less tenable, as parental liability can operate *per saltum*. If a head or intermediate group company is a purely financial holding, presumably it should be easy to replace it by a 'suitable candidate', recalling that group liability works almost as a fatality for modern organisations.

The best exit solution is for companies to prepare beforehand. In most cases, since rearranging their groups is not an option, the most parent companies may do is to take an active interest in ensuring that a comprehensive compliance programme and sound governance policies are in place to prevent these contingencies. They must also carefully consider contractual arrangements when acquiring companies and assets. Otherwise, parents will be left with the harsh task of showing that an undertaking is not an undertaking.

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